Special Programs and the Meaning of Equality and Discrimination

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NEW BRUNSWICK
HUMAN RIGHTS COMMISSION
COMMISSION DES DROITS
DE LA PERSONNE DU NOUVEAU-BRUNSWICK

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Editor's Note

The New Brunswick Human Rights Commission (Commission) develops guidelines as part of its mandate to protect and promote human rights in the province. These guidelines are intended to educate members of the public and other stakeholders about their rights and responsibilities under the New Brunswick *Human Rights Act* (*Act*).

This guideline offers the Commission's interpretation of special programs, the concept of discrimination, and the principles of equality. The guideline is based on current research and relevant decisions of boards of inquiry, tribunals, and courts; it should be read in conjunction with those decisions, and with the relevant provisions of the *Act.*[1] In case of a conflict between the contents of this guideline and the stipulations of *Act*, the *Act* would prevail. For clarification on any part of this guideline, please contact the Commission.

For information on your rights and duties related to other sections of the *Act*, please review relevant publications on the Commission's website or contact the Commission directly. Please be advised that the contents of this guideline do not constitute professional legal advice.

[1] The Commission thanks human rights commissions from jurisdictions across Canada for the opportunity to review their policies and documents on the themes of this guideline.

1.0 Introduction

Special programs are specific measures put in place by federal, provincial or territorial governments, and entities in the private sector, with the express purpose to give preferences in employment, housing or services to certain individuals or groups.

Special programs acknowledge that because of complex historical, economic, and sociocultural factors, some population groups have encountered barriers to full and equal participation in the social, economic, and political spheres.

> Special programs are specific measures designed by governments and the private sector to give preference to certain groups in employment, housing or services.

The obstacles these groups have faced were and continue to be the result of historically entrenched, institutionalized practices, which restrict economic and social prospects for these members of society, while allowing a level playing field to the rest of the population.

Because the denial of equal privileges has a long history and is embedded in institutional cultures and practices, special ameliorative measures are needed to correct these historical wrongs and extend equal socioeconomic opportunities to population groups impacted by sustained discriminatory treatment.

Examples of disadvantaged groups facilitated through special programs include women, persons with disabilities, Aboriginal communities, racial minorities, and others.

1.1 General Elements of Special Programs

In general terms, special programs are underpinned by the following features:

- A special program begins with the knowledge that a group does not enjoy equal opportunities and privileges in employment, housing or services, within a specific government or private sector.
- To remedy this disadvantage, the concerned government or private organization designs a special program, with provisions to address the identified hardships

experienced by the target group; the program grants preferences to the group that enable it equal access to employment, housing or services, relevant to the scope of the program.

> Special programs remove impediments to substantive equality and help actualize the human rights ideals of equity, diversity, and inclusion.

- Special programs bridge gaps that may be inherent in mainstream administrative, legal, and policy measures, or that are ingrained in institutional practices; they remove impediments to equality, correct historical wrongs, and advance the ideals of equity and non-discrimination.
- Special programs are entrenched in the Canadian legal structure; they serve to actualize the political and socioeconomic vision of diversity and inclusion, a cornerstone of the human rights system as it has evolved in the national, provincial, and territorial socio-legal spheres.
- Special programs are not the same as the duty to accommodate, which is a legal obligation placed on employers, housing or service providers.[1] Special programs are specific measures, additional to mainstream policies and regulations, which facilitate the inclusion of recognized groups in employment, housing or services.
- Special programs are designated by different names in Canadian law and policy:
    - Section 15(2) of the *Canadian Charter of Rights and Freedoms* (*Charter*) classifies them as affirmative action programs.
    - The federal *Employment Equity Act* uses the term employment equity.
    - Human rights codes generally prefer the label special programs, with some variations across provinces.[2]

1.2 Legal Sources of Special Programs

The concept of special programs derives from the universal ideal of social equality, as expressed in moral and philosophical tracts, and enshrined in international and national human rights texts.

The meaning of equality and non-discrimination has evolved through a cross-fertilization of ideas between international law (covenants and conventions), constitutional law (*Charter*), and statutory human rights systems (human rights codes); these sources also articulate the scope of special programs.[3]

The framework of special programs, as it has evolved in the Canadian legal and human rights domain, derives from stipulations etched in the following legal instruments:

1. **International Human Rights Covenants:** Equality and non-discrimination are core themes in contemporary international human rights covenants; provisions of these covenants are binding on states that sign and ratify them.[4]

The idea of special programs derives from international law, *Charter* rights, and human rights codes.

   - International human rights documents urge signatory states to institute special measures to alleviate the disadvantage of identified groups, if mainstream laws and policies are inadequate to ensure equal rights for these groups.
   - For example, Article 1(4) of the *International Convention on the Elimination of All Forms of Racial Discrimination* calls for "special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals' equal enjoyment or exercise of human rights and fundamental freedoms".[5]
   - The interface between international and national human rights law has become more distinct in recent years; now, as Canadian courts enter the third-generation of jurisprudence on *Charter* and human rights, they are increasingly looking toward international human rights norms to shape contemporary human rights jurisprudence.[6] Special program specifications in international covenants, therefore, have significant implications for national jurisdictions.

2. **The *Canadian Charter of Rights and Freedoms* (*Charter*):** Section 15(2) of the *Charter* sanctions the creation of affirmative action programs for groups "disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability."[7] The section stipulates the creation of affirmative action programs to eliminate equality constraints in existing laws and policies.

   - Section 15(2) protects "any law, program or activity" that is established for the "amelioration of conditions of disadvantaged individuals or groups" from being challenged under the *Charter*'s Section 15(1) equality rights. This important provision rules out potential so-called "reverse discrimination" challenges against affirmative action programs. (see section 1.7)
   - Section 15(2) does not create a statutory obligation to establish programs for reduction of disadvantage and discrimination; however, the section acts

with "statutory acquiescence", encouraging the establishment of affirmative action programs to alleviate discrimination.[8]

Special programs acknowledge the difference of disparate groups and pursue the ideal of substantive equality.

- The affirmative action provision of the *Charter* is expansive in scope, with a broad mandate for the eradication of systemic discrimination against disadvantaged groups.[9] (For systemic discrimination, see section 3.2.4)

3. **Employment Equity Legislation:** Following the *Report of the Abella Royal Commission* (see section 2.5), the federal government enacted the *Employment Equity Act*, which mandates the creation of special programs to "correct the conditions of disadvantage in employment experienced by women, Aboriginal peoples, persons with disabilities and members of visible minorities".[10]

    - The *Employment Equity Act* moves away from the constraining logic of formal equality (see section 2.2) and introduces the concept of substantive equality, just as it underscores the difference of disadvantaged groups (see section 1.6) to achieve substantive equality: "Employment equity means more than treating persons in the same way – it also requires special measures and the accommodation of differences".[11]
    - The employment equity statute limits its scope to employment in the federal government; thus, its provisions do not extend to private sector employment, or to housing and services.
    - No province has enacted employment equity legislation parallel to the federal law, but special program provisions incorporated in provincial human rights codes provide a mechanism for extending equality to minority groups in employment, housing and services.[12]

4. **Human Rights Codes:** Provisions for special programs are inscribed in federal, provincial, and territorial human rights codes (For details, see note 2). The government of New Brunswick incorporated a special program provision in the *Act* in 1971 (now Section 14).

1.3 Special Programs Under the *Act*

Section 14 of the *Act* empowers the New Brunswick Human Rights Commission to approve "programs […] designed to promote the welfare of any class of persons".[13]

The essential components of the section are as follows:

The Commission can preapprove special programs and provide expertise and oversight for program design and implementation.

- "Programs" may be undertaken by "any person";[14] "person" is defined in the *Act* to include employers, employment agencies, and trade unions; furthermore, the New Brunswick *Interpretation Act* also includes corporations in its definition of "person";
- Employers can apply to the Commission for the approval of a special program, or the Commission can approve a program "on its own initiative";
- The Commission has the power, both prior to and after approval, to:
    - Make inquiries about the program;
    - Make changes in the program;
    - Impose conditions on the program; or
    - Withdraw its approval of the program.
- Finally, the section indemnifies Commission-approved programs from challenges under the *Act*.

1.3.1 Scope of the *Act*'s Special Programs Provision

- The language of Section 14 is permissive, rather than prescriptive; this means that the *Act* leaves it to the discretion of employers, housing, and service providers to introduce special programs of their own volition, voluntarily rather than on a mandatory basis.
- Despite the above, the Commission encourages employers, housing, and service providers to incorporate and implement special programs, to ensure equality of disadvantaged groups in employment, housing, and services, as the case may be.
- While the section is focused on employment, it does not explicitly restrict its scope to employment; thus, by implication, the *Act*'s special programs provision also applies to housing and services.
- Moreover, Section 14 includes both private and public sectors within the ambit of its special programs mandate, unlike the federal employment equity legislation, for instance, which applies to the government sector only.
- The *Act* does not make it mandatory for employers and organizations to seek the Commission's preapproval of special programs that they introduce.
    - However, preapproval of a special program ensures tangible advantages for the organization that administers the program;
    - Commission-preapproved special programs get the benefit of Commission expertise and oversight before implementation; preapproved programs

would also be protected from human rights discrimination challenges under the *Act*, for as long as the preapproval is in place;

- However, the protection would only apply to the approved terms and conditions of the special program; it would not extend to any deviations from the approved terms and conditions or to other oversights in program implementation that may produce discriminatory effects;
    - For example, if the Commission approves a special program designed to hire women candidates in an organization, the program would not be discriminatory against male applicants. However, if the program's implementers begin to grant preference to white women applicants, the program would become liable for discrimination under the protected ground of race. (For details on how to implement a special program in your organization, see section 4)

> The aggregated term "visible minority", which lumps together disparate non-white groups, is a problematic category and not an accurate reflection of the population demographic. As Justice Abella has noted: "To combine all non-whites together as visible minorities for the purpose of devising systems to improve their equitable participation, without making distinctions to assist those groups in particular need, may deflect attention from where the problems are greatest".

1.4 New Brunswick Equal Employment Opportunity Program (EEO Program)

In 1984, the New Brunswick government, in consultation with the Commission, established the EEO Program, purposed to provide Aboriginal persons, persons with disabilities, and members of visible minority groups equal access to employment, training, and advancement opportunities in government employment.

The Government of New Brunswick's Finance and Treasury Board provides strategic oversight to the EEO Program. The program applies to Part 1 (Departments) and Part 2 (Schools) of government.

- The EEO Program contributes up to 50 percent salary (maximum $20,000 a year for up to two years) toward a government department to hire a person from a program designated group.[15]
- The EEO Program contributes $333.00 a month for up to five years to a government department that hires a person who receives a disability pension, or who can only work limited hours per week due to a health condition.

- As of fiscal 2018-19, 19 EEO registrants are benefiting from funding provided through the program.

> Special programs bring underprivileged groups into mainstream society and restore a corrective balance in socioeconomic relations.

The provincial government has not intervened to introduce a similar employment equity program for the private sector.

The New Brunswick *Pay Equity Act*, which oversees pay equity for women, is also designed for the government sector only; it does not address the gender pay gap in private employment.[16]

1.5 Diversity, Inclusion, and Special Programs

Special programs are powerful tools to materialize the human rights vision of diversity and inclusion.

- Because of widespread global migrations of recent history, large segments of diasporic communities, marked by ethnic, cultural, and religious diversity, have become part of the population demographic of Western societies.
- Anti-discrimination and human rights laws recognize the rights of diverse populations to equal treatment, and strive for their inclusion in social, economic, and cultural life.
- However, anti-discrimination and human rights laws are typically designed to prevent discrimination based on individual complaints; the complaints-based mechanisms of these laws have limited scope to bring about far-reaching socioeconomic transformation of underprivileged groups or to combat systemic discriminatory practices embedded in institutional structures.
- These limitations are assuaged by special programs, which can be more effectively leveraged to include larger segments of underprivileged groups into mainstream social advantages, through specific, targeted measures of alleviation.
- Special programs, therefore, are vital to advance the human rights agenda of equality, diversity, and inclusion.

1.6 Special Programs and the Recognition of Difference

All forms of discrimination – direct, indirect, and systemic – stem from a failure to acknowledge individuals or persons who exhibit attributes of difference from mainstream or privileged groups in society.

The human rights system recognizes the difference of individuals and groups, and protects discriminatory treatment based on the different characteristics that constitute the identities of these groups. The Supreme Court of Canada has endorsed that recognition of difference is a central tenet of human rights laws and special programs.[17]

> The Supreme Court of Canada has observed: "Treating historically vulnerable, disadvantaged or marginalized groups in the same manner as groups which do not generally suffer from such vulnerability may not accommodate, or even contemplate, those differences. In fact, ignoring such differences may compound them, by making access to s. 15 [*Charter*] relief most difficult for those groups that are the most disadvantaged of all in Canadian society". *Egan v Canada*,1995.

On the importance of recognizing the difference of other groups, the following points need to be emphasized:

- Respect for and recognition of difference is a cardinal principle of human rights law and jurisprudence.
- By recognizing difference and enabling the inclusion of persons with difference to equal enjoyment of socioeconomic advantages, the human rights system upholds the values of diversity, equality, and inclusion.
    - Special programs, which add an additional layer of protection to statutory human rights provisions, are likewise premised on the recognition of difference of certain groups from the majority population.
    - By extending preferences in employment, housing or services to these groups and acknowledging their difference, special programs advance the human rights agenda of equality and non-discrimination.

1.7 Special Programs and "Reverse Discrimination"

Special programs treat groups differently to achieve the overarching objective of socioeconomic equality. By default, special programs omit mainstream or traditionally privileged (non-discriminated) groups from their benefits.

- For example, if an organization creates a special program that is designed to hire only women, Aboriginal groups, and LGBTQ2S communities for a specific period, the program would exclude men, non-Aboriginal persons, and cisgender groups from employment opportunities in the organization;

When special programs are designed with equitable fairness, they would be protected from claims of so-called "reverse discrimination".

- Theoretically, the excluded groups could claim that the program discriminates against them, or has the effect of so-called "reverse discrimination";
- However, because historically privileged groups have not suffered conditions of disadvantage or been denied equal treatment because of personal characteristics (gender, race, ancestry, etc.), their omission from a special program designed for the benefit of marginalized groups would not constitute discrimination;

So-called "reverse discrimination" is not a legally recognized human right under Canadian human rights law and jurisprudence.

- "Reverse discrimination", therefore, is not a legally recognized human right.

In a recent judgement, the Supreme Court of Canada defined reverse discrimination as follows:

- "Reverse discrimination involves a claim from someone outside the scope of intended beneficiaries who alleges that ameliorating those beneficiaries discriminates against him or her".[18]

A contentious issue in American jurisprudence, reverse discrimination has not attracted much controversy in Canadian law.[19]

The Supreme Court of Canada has repeatedly reaffirmed that special programs are protected from challenges of reverse discrimination under Section 15(2) of the *Charter*:

- "The purpose of s. 15(2) is to save ameliorative programs from the charge of 'reverse discrimination'".[20]

Example: *In an important equality rights case, the Supreme Court of Canada rejected a reverse discrimination claim against a special program designed for the amelioration of Aboriginal groups. The government established a special program that granted exclusive fishing licenses to members of three Aboriginal bands, allowing them one extra day to fish in the Fraser river. The appellants, non-Aboriginal commercial fishermen, argued that the program discriminated against them under Section 15(1) of the Charter on the ground of race. Rejecting the argument, the Supreme Court held that Section 15(1) of the Charter guarantees equality to disadvantaged groups, while Section 15(2)*

> *combats discrimination through affirmative action programs; the fishing program was legitimate because it enhanced the access of Aboriginal groups to jobs and resources. Privileged or advantaged groups cannot litigate against programs aimed to alleviate historically vulnerable groups: "By their very nature, programs designed to ameliorate the disadvantage of one group will inevitably exclude individuals from other groups. This does not necessarily make them either unconstitutional or 'reverse discrimination'".*[21]

Similarly, in provincial jurisdictions, protections of special programs are embedded in human rights codes, and courts have tended to disregard claims of reverse discrimination against special programs.

> ***Example:*** *The Nova Scotia Supreme Court rejected the argument that a preferential minority hiring program adopted by the City of Dartmouth discriminated against a qualified white male applicant. The city's program, which was approved by the Nova Scotia Human Rights Commission, aimed to recruit women to raise their representation in the city's workforce to 44.9 percent, and to hire persons from racialized groups to raise their representation to 4.5 percent. The court held that the program passed muster as a special program under the Nova Scotia Human Rights Act, and the issue of reverse discrimination was not material in the case.*[22]

> ***Example:*** *The Ontario Court of Appeal held that even if a special program has "some incidental discriminatory effect", the program would still meet Ontario Human Rights Code's Section 14 requirements if it alleviated disadvantage and was rationally connected to its objectives. Section 14, the court noted, is not wedded to a reverse discrimination concept.*[23]

2.0 Special Programs and the Principle of Equality

The prime objective of special programs is to advance equality in society and social relations; they are designed to correct historical wrongs that have withheld the benefits of social, economic, and political equality from vulnerable groups in Canadian society.

> Special programs advance the core human rights values of equality and non-discrimination.

Special programs implicitly acknowledge that traditional anti-discrimination laws and mainstream policies, practices, and institutional structures are inadequate to ensure equality to all social classes and groups. Consequently, special programs go above and beyond traditional measures to bridge the equality gap in existing legal and policy frameworks, to alleviate conditions of inequality faced by disadvantaged groups.[24]

- Equality and non-discrimination are correlated principles:
  - When equality is enhanced in society, discrimination is curtailed;
  - Each principle (equality and non-discrimination) strengthens and ensures the sanctity of the other; and
  - Both concepts need to be examined, to appreciate the essential logic and ideology of special programs. (For discrimination, see section 3)

2.1 The Meanings of Equality

Equality is a universally understood ideal, but it is also an elusive concept, with slippages and subtle shifts in meaning.[25]

- In the contemporary legal sphere, the equality principle is embedded in international human rights conventions and treaties, from where it enters the legislations and legal structures of signatory nation states. (See section 1.2)
- In the Canadian context, equality guarantees are enshrined in the Canadian

> The Abella Royal Commission on Equality affirmed that "traditional anti-discrimination statutes and approaches were inadequate to deal with the magnitude of the problem [of inequality], as were the myriad of measures and programs established to coax improvement out of a reluctant society. What was needed […] was a comprehensive approach that would end an era of tinkering with systemic discrimination and introduce one that confronts it."

constitution through section 15(1) of the *Charter*, and equality (along with non-discrimination) forms the ideological foundation of federal and provincial human rights codes.

By claiming to treat everyone the same, the doctrine of formal equality fails to see the difference of socially and economically marginalized groups.

- In enhancing equality for minority groups, special programs seek to fulfill these constitutional and legal obligations.

In theoretical terms, two basic concepts of equality have prevailed in Western legal systems and jurisprudence: formal equality and substantive equality.

2.2 Formal Equality – Definition and Limitations

Formal equality represents the traditional equality doctrine that pervaded Western society and politics, until it was challenged by the rights revolution of the Twentieth Century.[26]

Formal equality dictates that everyone should receive the same treatment, irrespective of the differences that define individuals and groups from each other.

- Therefore, formal equality advocates the neutral treatment of all persons:
  - It advances the concept of individual justice, emphasizing consistent or equal treatment based on the norms and standards of dominant, mainstream groups in society.
  - To determine if a law or policy is equitable and fair, formal equality measures if persons or groups of similar standing are/were treated equally under the said law or policy.
  - Formal equality insists on sameness and similarly-positioned groups; it ignores groups whose characteristics make them different from the majority or mainstream groups.

As a result, under the formal equality framework, because of their difference (based on sex, disability, ancestry, race, etc.), certain groups risk being excluded from equal treatment in employment, housing or services. These groups fail to meet, or are perceived as failing to meet, the standard of equality as seen from a mainstream, majority lens.

- In contemporary societies, marked by increasing diversity, the template of formal equality does not promise a fair distribution of socioeconomic benefits.

- To correct this anomaly, special programs prioritize neglected minority groups, to achieve a more equitable redistribution of social privileges.

Special programs are special measures designed with the express purpose of eliminating systemic discrimination in employment, housing or services; special programs are not the same as the legal duty to accommodate, which is a distinct statutory obligation requiring employers or housing and service providers to accommodate the legitimate requests of code-protected groups.

2.2.1 Formal Equality – An Illustration

A simple example illustrates the limitations inherent in the doctrine or structure of formal equality:

- *A university conducts an admission test to assess the knowledge of applicants for admission to an academic program. Students who receive a certain percentage of marks in the test are admitted, while those who score below the required percentage are denied admission. This admission criterion would be fair if all the applicants had similar competencies or advantages. However, one of the candidates has a visual impairment, and she is not assisted during the test (through a braille text or an oral examination, for example). As a result, the special candidate, who is different from the majority applicants, if treated in the same way as the others, will be denied equal treatment and may suffer exclusion and disadvantage.*

The university can correct the disadvantage faced by the special candidate in two ways:

1. **Duty to Accommodate:** The university can facilitate the candidate in the examination by assistance in the form of a braille text, an oral examination, separate space and extra time or the help of a reader/writer to take dictation, etc. These measures would fall under the university's legal duty to accommodate the special needs of the student; the measures would not constitute a special program.

2. **Special Programs:** The university can establish a special program that reserves a fixed number of seats in the said academic unit for persons with disabilities who fulfill the other prerequisites of admission. This measure would constitute a special program, granting a preference in services (the university provides a service) to a historically disadvantaged group (person with a disability).

Therefore, the sameness principle of formal equality, when applied evenly to persons with diverse characteristics, fails to achieve equal results or outcomes for all individuals or

groups in society; it places weaker groups at a disadvantage in comparison with majoritarian, unburdened segments of population.[27]

> Special programs do not violate the principle of merit; by contrast, they acknowledge persons or groups whose merit is/was unrecognized because of entrenched stereotypes, and systemic discriminatory practices and policies.

Special programs resist the barriers that may be imposed on some persons due to a rigid formal equality standard; they address gaps in laws, policies or procedures that have the effect of excluding vulnerable groups from accessing social advantages on equal terms.

To reiterate, in broad terms, formal equality has the effect of:

- Ignoring historical and ongoing barriers that deny/have denied equal treatment to certain social groups.
- Disregarding that non-majority groups require different treatment, to avail benefits and advantages equally with those groups who do not typically face discrimination.
- Overlooking the discriminatory effect or impact of laws, rules or policies, and implying that the intent and purpose of laws, rules or policies are enough to judge their fairness.
- Using homogenous comparator groups to evaluate and define equal treatment, while ignoring the heterogeneous composition of contemporary societies.

2.2.2 Formal Equality, Special Programs, and the Merit Argument

Formal equality is defended as upholding the principle of merit in society, and eradicating irrational or arbitrary criteria from policy and decision making.

- However, modern societies, marked by mass migrations, diasporic communities, and diverse populations, and with new and emerging rights-holders (LGBTQ2S groups, for example), are complexly varied in composition.
- Laws and policies must reflect and keep pace with society's shifting population demographic and its evolving cultural and moral consciousness.
- Policies and practices based on the values and criteria of majoritarian groups would always result in excluding underprivileged persons from equal enjoyment of socioeconomic advantages.

When designed with care, special programs do not violate merit in society:

- A special program would not hire a less qualified person from a designated group, while ignoring a better qualified mainstream candidate.
- On the contrary, the objective of special programs is to bring qualified persons from marginalized groups into the mainstream, to recognize merit which has been overlooked because of perceptions about the inability or lack of capacity of certain groups.
- Such groups (women, for example) have traditionally been excluded from certain kinds of jobs; the exclusion is widely accepted as natural and fair, and its logic is internalized in the policies, practices, and cultures of organizations.
- See, for example, section 3.2.4 and note 68, for the Supreme Court of Canada's observation on women's exclusion from jobs in the national railway.

> Substantive equality offers a corrective to the constraining doctrine of formal equality; substantive equality and special programs push for substantive change and enhance the principles of social justice.

2.3 Substantive Equality – Conceptual Basis of Special Programs

The concept of substantive equality is rooted in the premise that everyone should be treated the same only if everyone started from the same position or enjoys/has enjoyed the same advantages or privileges.[28]

- If persons are disadvantaged by gender, race, ancestry, disability or other markers of identity, and have lagged because of these disadvantages, their different status should be considered in formulating laws, policies or procedures that impact the provision of employment, housing or services.
- Practices of substantive equality move beyond the formulaic constructs of formal equality, and they unravel the subtle discriminatory processes that permeate social and institutional structures.
- Substantive equality (and special programs) pushes for substantive change, ensuring that historically neglected groups are included in socioeconomic privileges and benefits.

2.3.1 Supreme Court of Canada on Substantive Equality

The egalitarian foundations of substantive equality form the bedrock of *Charter* rights and human rights laws. In its first decision on Section 15 (equality) of the *Charter*, the Supreme Court of Canada emphatically stated that the *Charter* endorses the principle of

substantive equality and requires positive remedial measures to protect disadvantaged groups.[29]

> Substantive equality and special programs strive to achieve equality in outcomes and results, beyond the formal structures of laws and policies.

- The Supreme Court rejected the similarly-situated analysis of formal equality:
    - Equality claims should be approached in a contextual framework, and the context of historically marginalized groups should be at the forefront of an equality analysis.[30]
    - Moreover, equality analysis must focus on the effects of a law, policy or practice, not just the purpose or intent of these measures.[31]
    - The Supreme Court affirmed that Section 15 has two purposes: to protect against discriminatory laws and to promote substantive equality in society.
    - Substantive equality involves a purposive, contextual, and expansive interpretation of anti-discrimination, in keeping with the principles of human rights jurisprudence that interpret human rights law in broad, liberal terms.

> According to the Supreme Court of Canada, the purpose of Section 15(1) of the *Charter* is "to prevent the violation of human dignity and freedom [caused by] disadvantage, stereotyping, or political or social prejudice"; it is "to promote a society in which all persons enjoy equal recognition at law as human beings or as members of Canadian society, equally capable and equally deserving of concern, respect and consideration". *Law v Canada*, 1999.

In another important equality rights decision, the Supreme Court of Canada linked discrimination to loss of human dignity:

The underlying principle of substantive equality (and special programs) is to prevent violations of human dignity, and to promote the full membership of underprivileged groups in society.[32]

2.3.2 How Special Programs Align with Substantive Equality

While formal equality is premised on a straitjacket yardstick of equal treatment, or the similar treatment of those who are similarly situated:

- Substantive equality (the philosophic core of special programs) is based on the idea of equal outcomes or results, and pays close attention to institutional

processes, imbalance of power between groups, and the causes/consequences of exclusion and inclusion.

Special programs align with redistributive justice, to transform prevalent socioeconomic structures into a more equitable balance.

- Substantive equality, like special programs, seeks inclusive equality:
    - It probes the actual realities and conditions of inequality, and the social, political, and institutional processes that facilitate its reproduction.
    - It thus brings attention to both the substance and processes that inform the workings of inequality.[33]
- The politics of recognition and the politics of redistribution are two underlying currents in substantive equality (and special programs):
    - **Politics of recognition:** Substantive equality and special programs begin with the recognition of difference and disadvantage.
    - **Politics of redistribution:** They move toward a redistribution of resources and benefits.
    - **A transformative praxis:** In this process, substantive equality and special programs ensure the inclusion of excluded groups, and the transformation of existing hierarchies of power and privilege.

Special programs are designed to advance social equality, beyond the limitations that are inherent in the doctrine of formal equality; special programs, therefore, pursue the following principles embedded in the configurations of substantive equality:

- **Acknowledging difference:** With substantive equality, special programs embrace the difference of individuals and groups, and aim to reduce disparity between vulnerable and non-vulnerable groups.
- **Focusing on the effects of laws and policies:** In keeping with the substantive approach, special programs aim to correct the negative impact or effects of laws and policies (looking beyond their intent and purpose), with specific focus on individuals or groups that have suffered historical disadvantage.
- **Correcting historical wrongs:** Special programs, with their substantive equality focus, rectify historical wrongs and past

"When equality claims are really substantive, they should challenge privileged understandings of the world and privileged players' understandings of themselves [….] More than any other constitutional right, the right to equality is a redistributive right. It calls into scrutiny the quality of the relationships we forge with others in society. It questions the justice of the distribution of rights, privileges, burdens, power, and material resources in society and the basis for that distribution". Sheila McIntyre

discrimination; in conceptual terms, they strive to allow everyone the same starting point in accessing employment opportunities, or housing and services.

- **Ensuring redistributive justice:** Special programs, like substantive equality, are based on the idea of redistributive justice:
  - They realign the distribution of social and economic benefits to bolster underprivileged classes and effect substantive equality in social relations.
  - Redistributive justice aligns with the welfare model of the Canadian state; substantive equality and special programs, therefore, are integral to the Canadian vision of state and society.[34]
  - Retributive justice is transformative; it re-examines the basis on which rights, privileges, burdens, power, and material resources are distributed in society.[35]

Instead of "equal treatment", substantive equality emphasizes "treatment as an equal".

- **Equality of outcomes:** Substantive equality and special programs aim at equality of outcomes:
  - While formal equality requires equal application of laws, policies, and procedures, substantive equality aims to achieve equality in the outcomes of laws and policies.[36]
  - Equality of outcomes is a core ideal in the conception of special programs.[37]

2.4 Special Programs and the Equality Provision of the *Charter*

Section 15(1) of the *Charter* provides comprehensive equality guarantees, ensuring the rights of citizens to equal treatment, with four layers of explicit equality protections:[38]

Equality before the law;[39] Equality under the law; Equal protection of the law;[40] and, Equal benefit of the law.[41]

The four-tiered equality protections require the law to be available equally to all, and to be equally applied.[42]

According to the Supreme Court of Canada: "It is easy to praise these concepts [enshrined in Section 15(1) of the *Charter*] as providing the foundation for a just society which permits every individual to live in dignity and in harmony with all. The difficulty lies in giving real effect to equality. Difficult as the goal of equality may be, it is worth the arduous struggle to attain. It is only when equality is a reality that fraternity and harmony will be achieved. It is then that individuals will truly live in dignity". *Vriend v Alberta*, 1998.

- The four equality rights ensure equality in legal process and procedure ("equality before the law" and "equality under the law"), and equality in legal substance or substantive law ("equal protection of the law" and "equal benefit of the law").
- In this way, Section 15 has enabled courts to move beyond formal equality to requiring that laws treat individuals as substantive equals, recognizing and accommodating their underlying differences.
- Section 15(1) also lists the grounds on whose basis it is prohibited to discriminate against an individual or group:
    - These "enumerated" grounds are "race, national or ethnic origin, colour, religion, sex, age or mental or physical disability".
    - The Supreme Court has stated that "analogous" grounds can be added by courts,[43] as new rights-holders emerge in a rapidly-evolving, globalized culture.[44]

- Section 15(1) has yielded to expansive interpretations:
    - It has been invoked by courts to validate the diversity and inclusion model of Canadian society.
    - The *Charter*, read in its entirety, together with Section 15(1) equality rights, fortifies a social and economic fabric of diversity and inclusion.
    - In doing so, the *Charter* eschews the American model of enforced assimilation, and projects the image of a diverse, inclusive polity.[45]
    - The *Charter*'s vision of equality, diversity and dignity, and of acknowledging and respecting difference, agrees with the ideological framework that underlies special programs.

The *Charter* embraces the notion of difference and inclusion and confers on a diverse citizenry the right to integrate into mainstream Canadian society. Section 23 of the *Charter* protects language rights, while Section 25 guarantees aboriginal rights and freedoms. Section 27 safeguards the diversity of cultural heritage, and Section 28 mandates gender equality. Furthermore, Section 36 declares the state's commitment to promote equal opportunity and reduce economic disparity. Read within this cluster of rights, the Section 15(1) equality provision of the *Charter* envisions an equitable, plural, and diverse Canadian polity.

Section 15(2) of the *Charter* shields affirmative action programs from challenge under Section 15(1) equality rights;[46] thus, Section 15(2) works as a buffer against reverse discrimination claims. (See sections 1.2 and 1.7)

Example: *In an important equality rights decision, the Supreme Court of Canada held that a fishing program providing preferential treatment to three aboriginal bands was an ameliorative program under 15(2) of the Charter. If the government*

can demonstrate that a special program satisfies the criteria of Section 15(2), and its purpose of the betterment of disadvantaged groups is clearly established, it would not be necessary to determine if it violated the Charter's Section 15(1) equality provision. The Supreme Court noted that every member of a designated group doesn't have to be disadvantaged for a program to be legitimate: Even if some members are not disadvantaged, it "does not negate the group disadvantage suffered by band members". The program merited Section 15(2) protection because it rationally addressed the longstanding disadvantage suffered by Aboriginal groups.[47]

***Example:** A feminist newspaper refused to print letters authored by men. The newspaper's women-only policy was upheld as a form of Section 15(2) affirmative action program, designed to ameliorate the inequality of disadvantaged women.*[48]

2.5 The *Abella Report* and Special Programs

In 1984, under the aegis of a Royal Commission, Rosalie Abella, current Justice of the Supreme Court of Canada, authored a comprehensive report on employment equity in Canada, which called for special measures to advance substantive equality in federal employment.[49]

> "Ignoring difference leads to inequality, while respect for difference ensures equal treatment". *The Abella Report*

Although conceived within the federal context, the report's recommendations have resonance for provincial and territorial governments, because it addresses entrenched structures of inequality prevalent in institutions, policies, and socio-cultural practices.

The *Abella Report* has had a profound influence on the evolution of employment and human rights law, equality jurisprudence, and public policy.[50] Following the report, the federal government promulgated the *Employment Equity Act* (1986; 1995) and the *Federal Contractors' Program* (1986), which are inbuilt with mandatory mechanisms to address systemic discrimination in the workplace.

The report's salient features are instructive to understand the core values that must embody special programs. Its essential ideas include the following:

> "Equality demands enforcement. It is not enough to claim equal rights unless those rights are somehow enforceable. Unenforceable rights are no more satisfactory than unavailable ones."

A Made-in-Canada Solution to Employment Inequality: Rejecting the US affirmative action model, which is based on prior finding of discrimination and the individual rights model, and includes quota allocations, Justice Abella proposed a home-grown Canadian model of equality, which she termed "employment equity", a legal analogue for equality.[51] The term "employment equity" has been widely embraced, and was enshrined in the federal legal scheme through the *Employment Equity Act.*

Formal Equality is Exclusionary: The report recognizes that formal equality, based on the similarity principle, is an exclusionary concept, because it disregards persons who are in some way different from the standard of merit presumed or accepted by employers and organizations.[52]

- For true equality, everyone must not be treated the same; some persons or groups must be treated differently from others, to allow them equal benefits of employment.[53]

> "To create equality of opportunity, we have to do different things for different people. We have to systematically eradicate the impediments to these options according to the actual needs of the different groups, not according to what we think their needs should be."

Substantive Equality Brings Inclusion: The report affirms the principle of substantive equality, and it recognizes that the objectives of substantive equality can only be achieved if governments take substantive measures to remove systemic barriers to inequality.[54]

Inequality Has Systemic Roots: The report highlights that inequality in Canada has systemic roots that need to be dislodged by systemic remedies. Barriers to equity are built into the structures, cultures, and everyday practices of workplaces, and sanctified by historical precedent and prolonged usage. These barriers reinforce the privilege of dominant groups, who do not experience the barriers but benefit from their exclusionary impact. By removing these barriers and discriminatory disadvantages, workplaces can achieve inclusive practices and policies.[55]

Equality Must be Mandatory, Not Just Voluntary: The report underscores the need for mandatory measures to achieve the goals of substantive equality; leaving the pursuit of equality to voluntary efforts of employers would not achieve results. The report

advocates a mandatory, legalized model of employment equity, set in place through legislative measures that would impact policy change in federal employment.[56] Through comprehensive statistical data, the report establishes the pervasive nature of systemic discrimination in Canadian workplaces, and proposes systemic change derived from values rooted in Canadian history, norms, and institutions.

> "Equality in employment is not a concept that produces the same results for everyone. It is a concept that seeks to identify and remove, barrier by barrier, discriminatory disadvantages. Equality in employment is access to the fullest opportunity to exercise individual potential."

Equality Begins with Recognition of Difference: The report stresses the urgent need to recognize differences between individuals and groups, which would lead to elevation of groups sidelined in law, policy, and practice. Recognition of difference is at the heart of substantive equality. To achieve substantive equality, marginalized persons or groups should not be forced to assimilate into existing

workplace cultures and practices (the American melting pot model), but workplace cultures should adapt to include the differences of disadvantaged groups in order to achieve fairness and inclusion for all.[57]

Equality Is an Ongoing Process: The report defines equality as an evolving idea: rights that were obscured in earlier generations continue to find recognition, as new rights-holders emerge and advocate their inclusion in the rights agenda. Equality, therefore, is a process, and involves ongoing engagement to keep up with social, cultural, political, and economic change.

> "What we tolerated as a society 100, 50, or even 10 years ago is no longer necessarily tolerable. Equality is thus a process - a process of constant and flexible examination, of vigilant introspection, and of aggressive open-mindedness."

- To conceive composite, substantive equality, laws, policies, and attitudes require "vigilant introspection and aggressive open-mindedness".[58]
- The vocabulary and meaning of equality continue to evolve, to include multiple and varied permutations of inequality, and the myriad effects of discriminatory laws and practices.

Redistributive Justice Ensures Equality: The report advocates the concept of redistributive justice, to realign rights, privileges, and benefits in equitable ways and achieve equality in real terms.[59] (see section 2.3.2)

Mainstream Laws and Policies Are Not Enough to Ensure Equality: By proposing the creation of employment equity measures, the report acknowledges that mainstream anti-discrimination and human rights laws (including labor codes, human rights acts, and the *Charter*) focus on individual complaints of discrimination and on acts of intentional discrimination. Consequently, these laws leave the structures and institutions that produce inequality largely unchallenged.[60]

> "We have to give individuals an opportunity to use their abilities according to their potential and not according to what we think their potential should be. The process is an exercise in redistributive justice. Its object is to prevent the denial of access to society's benefits because of distinctions that are invalid."

The *Abella Report* ushered a shift in the conception of equality in Canadian law and policy and became the basis of Supreme Court of Canada's equality jurisprudence in the 1980s and 1990s. It led to the promulgation of the *Employment Equity Act*, the federal special programs legislation, and the *Federal Contractors' Program,* devised to combat systemic workplace discrimination.

The findings of the *Abella Report* should be kept in view in designing the mechanisms and objectives of special programs (section 4). They are equally instructive in understanding the complex structures that enable systemic discrimination in the workplace and, by analogy, in services, housing, and other areas.

3.0 Special Programs and the Concept of Discrimination

While complaints based human rights remedies protect against individual acts of discrimination, special programs have the leverage to remedy more entrenched forms of institutionalized or systemic discrimination.

Discrimination can take the form of withholding of benefits or imposing of burdens, which push vulnerable groups to socioeconomic disadvantage and systemic mistreatment.

Thus, along with the advancement of substantive equality (section 2.3), protection against the effects of systemic discrimination is at the heart of special programs.

3.1 Meaning of Discrimination

In broad legal terms, discrimination occurs when an individual or group is treated disadvantageously because that individual or group belongs to a historically marginalized group or identifies with a unique characteristic like sex, disability, gender identity or expression, race, ancestry, and so on.

These characteristics are recognized in human rights codes as grounds of discrimination; human rights law protects discriminatory treatment of individuals and groups who identify with these grounds.[61]

The Supreme Court of Canada has defined discrimination as follows:

“Discrimination may be described as a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society”.[62]

In general terms, to understand discrimination the following points should be noted:

- Discrimination and its resulting disadvantage frequently emanate from subtle, often hidden, apparatuses of power and exploitation.
- Discrimination takes place because the worth or ability of a person (or group) is assessed against a normative criterion or standard; this standard has taken root in society through a complex array of historical, cultural, and economic processes.
- Traditionally and in historical terms, in Western cultures, the able-bodied, white, Christian heterosexual male has been projected as that norm or standard.
- Consequently, discrimination happens when individuals who deviate or are different from this projected norm – for example, women, disabled persons, non-whites or racial minorities, individuals espousing different religious beliefs, gender-diverse persons, and so on – are regarded as less suitable to fill employment positions, or to avail housing or services.
- Discrimination can take the form of withholding of benefits, or imposition of burdens.[63]
- Human rights laws address direct and indirect discrimination, while special programs remedy systemic discrimination. (see section 3.2.4)

Discrimination operates within three contexts. Firstly, it happens at the micro or individual level, pushing marginalized groups toward social disadvantage. Secondly, discrimination operates in the institutional context, both in the formal structures of institutions, and in their informal day-to-day practices. Thirdly, discrimination manifests in larger social, economic, and political contexts, revealing broader patterns of exclusion that undermine equality rights and impede institutional transformation. These three contexts are intricately interwoven; they intersect to produce and reproduce structures of inequality.

In situations of discrimination, it is not relevant that the person or organization had no intention to discriminate or was ignorant of its discriminatory actions and their effects.

3.2 Types of Discrimination

Discrimination can be blatantly obvious, or veiled and subtle; it can be direct and open, or indirect and underhand.

To mark out broad categories, discrimination is separated into three types, with overlaps and intersects between them: direct discrimination; indirect or adverse effects discrimination; and systemic discrimination.[64]

While the Supreme Court of Canada described the distinction between direct and adverse effects discrimination as “artificial” and “malleable” and proposed a generic three-part test (Meiorin Test) to establish discrimination, the three types of discrimination (direct, adverse effects, and systemic) continue to be referenced in legal scholarship and court decisions.

3.2.1 Direct Discrimination

Direct discrimination is unambiguous and displays clear and distinct prejudice against a person or group protected under human rights law:

Direct discrimination is animated by prejudice and involves contempt of or belief in the inferiority of the excluded groups.

- In direct discrimination, the discriminatory treatment is meted out to the person or group because of who they are, i.e. because of their gender, disability, race, Aboriginal ancestry, and so on.
- Direct discrimination is animated by prejudice and involves contempt of or belief in the inferiority of the excluded group.
- Acts of direct discrimination are typically redressed under anti-discrimination and human rights laws, and do not need the intervention of special programs.

3.2.2 Examples of Direct Discrimination

- **In employment:** A female sales employee at a busy retail store informs her employer that she is undergoing gender transition, and would soon begin to identify with the male gender. On learning this, the employer transfers the employee against her wishes to a position with minimal customer contact. The employer would be liable for direct discrimination based on the protected ground of gender identity or expression.

- **In housing:** A housing provider publishes a rental advertisement for an apartment building with the proviso that applicants with babies or young children would not be considered. The advertisement would amount to direct discrimination in housing based on the protected grounds of family status and sex (pregnancy).

- **In services:** A racialized couple visit a hotel to book its executive lounge for their son’s wedding. They are informed that no bookings are available in the foreseeable future; however, the couple overhear the manager booking the same lounge for

another guest on the dates they had requested. The manager and hotel would be liable for direct discrimination in the provision of services based on the protected ground of race.

3.2.3 Indirect or Adverse Effects Discrimination

Sometimes, a law, rule or practice looks innocent on its face and is instituted without the intention to discriminate, but it impacts certain individuals or groups adversely; such a law, rule or practice would be discriminatory, because, notwithstanding its intent, it produces a discriminatory effect. This kind of discrimination is termed indirect or adverse effects discrimination.[65]

Acts of indirect discrimination may not intend to discriminate, but they are blind to and produce adverse impact for certain individuals or groups.

- While direct discrimination proceeds from overt prejudice, adverse effects discrimination typically arises from inattention to the difference of disadvantaged groups.

  Example: *The complainant was a member of the Seventh-day Adventist Church, which, according to its beliefs, disallowed its adherents to work on Fridays and Saturdays. Her employer, however, required all employees to work Fridays and Saturdays; when the complainant did not show up for work on those days, the employer terminated her full-time position. In its first ruling recognizing adverse effects discrimination, the Supreme Court of Canada held that the employer's apparently neutral rule had adverse effects for the complainant, and was therefore discriminatory.*[66]

  Example: *The applicants were born deaf and used sign language to communicate; they argued that the provincial healthcare system (British Columbia) did not provide insured access to sign language interpreters, so they could not access its benefits to the same extent as hearing persons. In its unanimous judgment, the Supreme Court of Canada recognized that the healthcare policy resulted in adverse effects discrimination for the applicants. On its face, both hearing and deaf persons received medical services free of charge in the province; however, by not covering the cost of interpreters, the system adversely impacted the deaf applicants. The neutrality of the rule and the good intention of the lawmakers were particularly relevant in the case because, as the Supreme Court noted, governments do not intentionally discriminate against disabled persons. Adverse*

effects discrimination, therefore, needs be recognized by looking beyond the intention and apparent impact of laws, rules, and policies.[67]

Systemic discrimination is entrenched in institutional practice, in historically sanctioned discriminatory rules and policies, and unconscious conduct and choices that discriminate against historically marginalized groups. Systemic discrimination requires systemic remedial measures to dislodge.

- Adverse effects discrimination can also reveal elements of direct discrimination; if a neutral rule is adopted with the knowledge that it could have adverse impact on certain groups, then it would also be liable to direct discrimination.
- Likewise, adverse effects discrimination intersects with systemic discrimination, when individuals or organizations unknowingly adopt society's prejudices and stereotypes into their policies and practices.

3.2.4 Systemic Discrimination

Most societies are defined by past, current, and emerging forms of discrimination. When discriminatory policies, decision-making, attitudes, and behavior patterns are embedded in the institutional and organizational practices, they produce and reproduce systemic discrimination or entrenched, institutionalized discrimination. Systemic discrimination becomes integral to organizational culture; it is sanctioned by prolonged usage and by the authority of customary practice. Through these practices, it acquires a veneer of normalcy.

According to the Supreme Court of Canada: "Systemic discrimination in employment […] results from the simple operation of established procedures of recruitment, hiring and promotion, none of which is necessarily designed to promote discrimination [….] The discrimination is then reinforced by the very exclusion of the disadvantaged group because it fosters the belief, both within and outside the group, that the exclusion is the result of 'natural' forces, for example that women 'just can't do the job'." *Canadian National Railway v Canada*, 1987.

- Systemic, institutionalized discrimination has overlaps with adverse effects or indirect discrimination:
  - Systemic discrimination may also involve direct discrimination, when systemic discriminatory practices are widely tolerated and are known to those who are responsible for implementing them.[68]
- Systemic discrimination is rooted in historical, political, and economic imperatives:
  - For example, African-Americans in the United States and Aboriginal peoples in Canada have been archetypal victims of systemic, institutionalized discrimination.

- Systemic discrimination is difficult to dislodge, because it involves dismantling practices, policies or rules that are firmly entrenched in institutional cultures and precedent and have been legitimized by custom and extended usage.
- Systemic discrimination creates barriers and exclusions that both stem from and result in unequal distribution of power; these barriers produce and reproduce discrimination and inequality.
- Special programs are a powerful tool for remedying the effects of systemic discrimination.

3.2.5 Understanding Systemic Discrimination – An Illustration

In the Canadian context, Aboriginal peoples have been characteristic victims of systemic discrimination:

> The Supreme Court of Canada has noted: "Indigenous people are the target of hurtful biases, stereotypes, and assumptions, including stereotypes about credibility, worthiness, and criminal propensity [….] Discrimination experienced by Indigenous persons, whether as a result of overtly racist attitudes or culturally inappropriate practices, extends to all parts of the criminal justice system." *R. v Barton*, 2019.

- They were displaced from their lands, excluded from political life, and denied cultural expression.
- In addition, they were subjected to intergenerational trauma through the botched government policy of residential schools.
- Moreover, they have suffered entrenched disadvantage and psychological scarring because of deep-seated racism and stereotyping.
- These historical legacies have perpetrated the systemic discrimination of Aboriginal peoples, which has manifested in hardships in employment, housing, and essential services like health and education.
- Within this context, special programs offer a unique mechanism to diminish the historic disadvantage and systemic discrimination faced by Aboriginal groups.

In summation, the following salient points should be reiterated:

- Preventing discrimination is at the heart of human rights law; the human rights legal system, however, is designed primarily to address individual instances of discrimination, one complaint at a time.

- For this reason, most human rights jurisdictions have provisions for special programs, which can address systemic discrimination in a wider arc that is typically not reachable in complaint-based human rights remedies.
- Special programs, while promoting equality and non-discrimination, are especially influential to combat the effects of systemic discrimination.
- Systemic discrimination requires systemic remedies,[69] and special programs furnish the mechanism for such systemic remedial measures.

4.0 Instructions on Setting Up Special Programs

Special programs play a vital role in bringing underprivileged, marginalized groups into mainstream society, which helps consolidate the human rights agenda of equality, diversity, and inclusion.

> Special programs must be consistent with underlying human rights principles.

The *Act* allows employers, housing, and service providers to set up special programs to ameliorate groups who may be facing barriers to equal treatment in employment, housing or services. Special programs may be set up both in the public and private sectors, designed for groups who show evidence of disadvantage, within the purview of each specific special program.

- In general terms, special programs must be consistent with underlying human rights principles.
- The overarching factors to consider when setting up special programs include:
  - The degree of disadvantage faced by the groups designated in the program;
  - The size of the organization offering the special program; and
  - The scope, duration, and objectives of the special program.

The basic structure of a special program should be guided by the following principles, objectives, and mechanisms:

Pursuit of Equality: Special programs must be designed to advance the core values of equality, non-discrimination, and inclusion; they should create conditions of equality within the sphere of their mandate, by eliminating the barriers to equality faced by the target groups identified as the program's beneficiaries.

Administrators of special programs must recognize that:

- Special programs espouse the principles of substantive equality:
  - They acknowledge the difference of historically disadvantaged social groups, and safeguard their rights in employment, housing or services (as the case may be), within the context of the program.

- Special programs remedy systemic discrimination, which is often entrenched, institutionalized, concealed, and/or perceived as normal:
    - Special programs are a powerful remedial tool for transforming the deep, institutionalized structures that normalize systemic discrimination and perpetuate systemic inequality. (For details on substantive equality, see section 2.3)

Special programs must respond to a real disadvantage, backed by statistical data.

Example: *An Ontario Divisional Court held that a bylaw of the Ontario Teachers' Federation which required female elementary school teachers to be members of the Federation of Women Teachers' Association of Ontario was not an affirmative action program within the meaning of section 14 of the Ontario code. The court found that the program did not have an equality or ameliorative focus.*[70]

Evidence of Disadvantage: Special programs must respond to a real disadvantage being experienced by the beneficiary group; the scope of the disadvantage must be backed by statistical data.

Through data analysis, implementers of the special program must be able to show the equality gap the program would bridge:

- For example, special programs that address inequality in employment must use economic indicators like unemployment rates, labour force statistics, representation by occupation, levels of income, education levels, and other related statistics to demonstrate the disadvantage suffered by the group specified under a program.
- For certain scenarios, available data sources, like the socio-economic indicators produced by Statistics Canada, may be adequate to document the under-representation or disadvantage of certain groups;
    - For example, employment statistics for women or Aboriginal groups could indicate the under-representation of these groups in employment, within the scope of a specific program.
- Special programs should be structured to enable the inclusion of designated groups in proportion to the under-representation or disadvantage these groups face in the area addressed by the program;
    - For example, if a designated group has faced severe and entrenched disadvantages in employment within an organization, such wide-ranging

disadvantage would need to be remedied through a broad, comprehensive special program.

- The scope of special programs can be similarly determined based on the scale of disadvantage faced by the beneficiary group, as substantiated by relevant research data.

Special programs in employment can use information on salary levels, length of service, employment status, promotion and training opportunities, and termination and layoff statistics of a target group to measure the disadvantage it has faced compared to other groups.

Example: *In a 1987 decision, a test case on systemic discrimination, the Supreme Court of Canada found that women faced deeply entrenched discrimination in recruitment to blue-collar jobs in the Canadian railway. The Supreme Court noted that if an organization displays such deep-rooted history of excluding a vulnerable group, it would require a comprehensive special program with far-reaching impact to remedy the historical disadvantage of the excluded group.*[71]

- In setting up special programs, analysis of both the internal workforce of an organization and the state of the workforce outside the organization should be carried out as part of the evidence gathering and assessment process.

    - An **internal analysis** could identify members of target groups within an organization;
        - For example, the salary levels, length of service, employment status (full-time or part-time), promotion and training opportunities, and termination and layoff statistics of the target group, compared to other groups, could be used to measure their comparative disadvantage in the organization.
        - For example, a special program to facilitate persons with disability may be warranted in an organization if an internal analysis reveals inadequate representation of disabled persons in its workforce, or unequal advancement and training opportunities for disabled employees.
    - An **external analysis** can use information from federal and provincial departments, or community agencies and educational institutions, to identify concentrations of unemployed members of designated groups and thus create special programs facilitating the employment of these groups.

Example: *The Elementary Teachers Federation of Ontario designed a women-only program to address systemic sex discrimination experienced by women teachers in promotions to upper-level executive positions. The Tribunal validated the legitimacy of the special program, relying on statistics provided by the Teachers Federation that showed the under-representation of women in leadership positions within the Federation.*[72]

Organizations must look inward to assess if they need special programs to alleviate conditions of disadvantage for some groups.

- Generally, the level of analysis required for setting up a special program would depend on the extent of amelioration the program aims to achieve:
    - For example, a special program designed for an organization that completely excludes the target group from employment opportunities would involve a different level of planning and analysis, compared to a program designed for an organization that has a moderate level of under-representation for the target group.
- When special programs are designed to respond to an authentic need and real disadvantage, they will evade the perception of so-called "reverse discrimination";
    - "Reverse discrimination" claims allege that special programs are discriminatory toward mainstream groups, even if they improve the conditions of historically disadvantaged groups. (see section 1.7)

Assessment of Organizational Policies: To assess if a special program is required within an organization, employers should thoroughly review their policies to identify any employment related barriers faced by historically disadvantaged groups.

- The following areas may be examined closely, to see if policies, procedures, and practices in these areas produce adverse effects for vulnerable groups like women, Aboriginal persons, disabled individuals, racialized groups, and other code-protected persons:

    - Screening, selection, and hiring procedures;
    - Training, development, and promotion opportunities;
    - Wage rates and salary structure;
    - Disciplinary and administrative policies;
    - Accommodation accorded to employees;
    - Workplace harassment policies;
    - Accessibility facilities in the organization;
    - Performance reviews; and
    - Termination and layoff procedures.

Consultation and Supporting Data: A special program should be developed through consultation, and by identifying a rationale, supporting data, eligibility criteria, and an evaluation method. When all these factors have been considered in setting up a program, the likelihood of legal challenges by persons outside the designated groups would be minimal.

The projected goals, timeframes, and objectives of a special program must be clearly established in measurable criteria.

- **Consultation:** It is advisable to consult with groups or associations that work for the amelioration of the designated group;
    - For example, a program addressing the disadvantage of women or disabled persons should consult with associations dedicated to working for these groups.
    - Other entities that could potentially be included in the consultation process include: unions or employee associations, tenant associations, community organizations, service users, etc.
- **Documenting the process:** The consultation process and the resulting analysis and review should be properly documented, to keep a record of the planning and implementation process involved in setting up the program.
- **Tribunal or court direction:** If a program is established on the direction of a tribunal or court order, it should follow the requirements set out therein.

Timeframes and Projections: The projected goals, timeframes, and objectives of a special program must be clearly established in measurable criteria.

- If the objective of a program is to increase representation of a certain group in employment, housing or services, the objective should be backed by numbers, percentages, surveys, etc.
- Projected matrices and timetables for program implementation should be adhered to and reviewed periodically.
- Typically, statistics on the under-representation (in employment, for example) of the identified group should be balanced by corresponding data on the availability of qualified members of the group, or those who would qualify for the program's benefits within the lifespan of the program.
- Both short-term and long-term objectives should be projected for the designated groups, and for the areas addressed by the program (hiring or promotions in an employment-focused program, for example).
- It is prudent to keep the program's goals relatively flexible for the first or second year of the program, to factor in potential changes in organizational structure,

- population demographic, economic indicators, and other variables that could impact outcomes in the program's later years.

Evidence of Amelioration and Program Evaluations: A special program must document with clear evidence (numbers and statistics) the gains achieved by the program, to indicate the extent it has ameliorated the disadvantage of its target groups.

- These figures can be offset against other statistics collected under the program (unemployment rates and labour force figures, for example) to make informed decisions about continuation, extension or modifications in the modalities of the program.
- If criteria and objectives are laid down prior to program initiation, they facilitate in measuring the program's effectiveness at various stages of its implementation.

Example: *The Manitoba Rice Farmers Association challenged the Manitoba Human Rights Commission's approval of a government special program that gave preference to Aboriginal peoples in obtaining licenses for wild rice harvesting, with the objective to enable Aboriginal groups to "achieve a leading role in the industry". The Board found little nexus between the objective of the program (helping a disadvantaged group) and the remedy it offered. It acknowledged that Manitoba's Aboriginal communities were economically disadvantaged, but it did not see preference for harvesting of wild rice as an adequate remedy for their amelioration. The Board also rejected the argument that even if the program violated Section 15(1) of the Charter, it should still be protected under the Charter's Section 15(2) affirmative action program protections.*[73] **

** *It may be noted that the decision was later overturned by an appeals court on technical grounds and no longer carries a "strongly persuasive authority".*

- Program evaluations should be conducted periodically, to tweak the mechanism for better results, if required.
- Because special programs are designed to remedy or prevent disadvantages suffered by certain groups, a special program is only justifiable for as long as the disadvantage persists:

    - Sponsors of special programs should periodically reassess the objectives of the program, to ascertain that the

To avoid complications in their delivery and execution, special programs should clearly define the target groups that their benefits are designed for.

conditions of disadvantage addressed by the program still exist.
- Special programs should be phased out if evidence indicates that they have achieved their objectives.

Target Groups: A special program should clearly define the target group that it intends to benefit, so that eligibility for participation in the program is unambiguous. If the definition of the target group is too broad, it may be misconstrued that the program's benefits extend to groups that are not intended as program beneficiaries.

- For example, if a special program offers a service targeted to individuals with disabilities, it should specify if persons with both physical and mental disabilities are covered under it.
  - It is imperative to clearly demarcate the target group, because a program (in the example above) designed only to assist persons with physical disabilities would not be effective or relevant for persons with mental disabilities.
- If a program is designed for a subgroup within a protected group, it should be based on detailed statistics and analysis that show the more urgent need of that subgroup.

Example: *A program designed to benefit persons with more severe disabilities was held by the court as legitimate and justified, in the context of the program's objectives. Relying on the presented evidence, the court determined that it was reasonable not to extend the program's benefits to every person who identified with a disability.*[74]

Example: *The Supreme Court of Canada held that a casino project, a special program that provided benefits to Aboriginal bands, did not violate Section 15(1) equality rights of Aboriginal groups not organized in bands. The court did not agree that Aboriginal groups not in government-organized bands had the same disadvantage as the Aboriginal bands who were the beneficiaries of the project.*[75]

Example: *The government of Ontario ran a literacy and basic skills program under the Ministry of Training, Colleges and Universities. The complainant, a person with a severe developmental disability, alleged that he could not access the program's services and that was discriminatory under the ground of disability. According to the Tribunal, the program was designed to*

Self-declaration by applicants is a standard method used by government programs to identify their potential beneficiaries.

benefit low-literacy adults to train them for employment, further education, and self-reliance; it was rationally connected to
its purpose of assisting a disadvantaged group to achieve equal opportunity. The program was not targeted to persons with severe developmental disabilities, and that exclusion was within the scope of the special program provision of the provincial human rights code.[76]

Methods of Identifying Target Groups: A suitable method must be laid down for determining the eligibility of persons for whose benefit a special program is designed.

- **Voluntary identification:** Some programs work by voluntary identification:
  - For example, government special programs encourage self-declaration, which confirms the identity of applicants as members of the group designated to receive preference in an employment process.[77]
- **Mandatory identification:** Identification may be mandatory for some programs:
  - For example, a transit service that offers concessional fares to senior citizens would require program users to provide an identification confirming their age.
- **Privacy:** Measures should be put in place to safeguard the dignity, self-respect, and privacy of self-declaring target groups in the program delivery process.

Excluding Groups from Special Programs: If a program excludes certain code-protected groups from its benefits, the exclusion must be backed by data and analysis to substantiate that it does not violate the rights of the excluded groups.

- Typically, special programs only exclude advantaged groups, or groups that have not faced/are not facing systemic discrimination, within the scope of the specific program.

If a special program excludes code-protected groups from its benefits, the programs must meet the same non-discrimination standards as other policies, programs or services.

Example: *A Board found that an employer's pre-retirement vacation initiative was a special program within section 13 (now Section 14) of the Ontario Human Rights Code. The employer offered extra vacation time to employees with 25 years of service if they were over 61 years of age, but not otherwise. The complainant had 25 years of service but was not 61, so he was not entitled to the benefits of the program. The objective of the program was to acclimatize employees nearing retirement age by increasing their time away*

from work. The Board held that the program was not discriminatory, and it was rationally connected to its objectives: helping older workers transition from full-time employment to full retirement.[78]

- If a program excludes a person who has a disadvantage that the program is directly designed to benefit, the program's exclusion of that disadvantaged person may be held as discriminatory.

  Example: *The complainant, a cancer patient with multiple disabilities, received income support under the Ontario Disability Support Program (ODSP). She developed a business that connected cancer patients with services in the community, and she employed subcontractors to do part of the work. In calculating her eligibility for income support and health benefits, the ODSP did not deduct amounts she paid to the subcontractors; thus, the complainant ceased to meet the income criteria to be eligible for disability benefits. The Tribunal found that even though ODSP rules did not support complex business ventures, they disregarded individual differences between income recipients and failed to accommodate persons with disabilities who were able to work. The program unfairly discriminated against the complainant.*[79]

- If the member of a disadvantaged group challenges the program's exclusion of its group, it would not constitute a "reverse discrimination" challenge; so-called "reverse discrimination" is alleged by advantaged or mainstream groups. (see section 1.7)
- If special programs exclude code-protected groups from their benefits, the programs must meet the same non-discrimination standards as other policies, programs or services.
- Special programs should not discriminate internally against the very persons they are meant to serve.[80]

  Example: *A government program overseen by the Ministry of Health gave financial assistance to persons with visual disabilities to purchase visual aids. However, only persons 24 years-old or younger could access the program, and older persons were ineligible for its financial assistance scheme. A 71-year-old man challenged the program on the ground of age discrimination; the Court of Appeal held that the program was a legitimate affirmative action measure under the Ontario Human Rights Code, but the age restriction was not rationally connected to its objectives. The program violated "the very inequality and unfairness it [sought] to alleviate".*[81]

Example: *According to a program under Ontario's Ministry of Government and Consumer Services, a person could apply to change the sex designation on their birth certificates, if they showed proof that they had undergone "transsexual surgery". The Tribunal found that the surgery requirement was not rationally connected to the program's purpose, and it was discriminatory against transgender persons. By limiting the benefit of sex designation change to a certain class of persons within the transgender community, the program placed a discriminatory burden on the target group it was designed to benefit.*[82]

Commission Oversight and Approval: Special programs can be set up by organizations on their own initiative, or they can be set up with the guidance and approval of the Commission.[83] The Commission can make inquiries about a Commission-approved special program, vary or impose conditions, and withdraw its approval of the program. (see section 1.3.1)

The Commission can make inquiries about a special program, vary or impose conditions on it, or withdraw its approval of the program at any stage.

- If the Commission has provided oversight and guidance on a special program, program administrators are generally required to submit periodic progress reports to the Commission.
- Most special programs have designated timelines or lifespans; the Commission would typically approve programs for one-year to five-year periods, with possibilities of extension after review and evaluation.
- Sometimes human rights tribunals or boards may be petitioned to review the modalities of a special program.

Example: *A Board held that its jurisdiction to rule on the bona fide status of a special program should be exercised, if at all, only on an application by a person outside the program's beneficiary group. The applicants were Wheel-Trans users, and were seeking a ruling on the Toronto Transit Commission's Wheel-Trans Program – an alternative service for disable persons. Because they were beneficiaries of the program, their application was not entertained.*[84]

4.1 Special Programs in Housing and Services

Generally, the principles that apply to special programs in employment would apply to special programs designed to reduce barriers or disadvantages faced by target groups in housing and services.

Special programs designed to reduce disadvantages in housing and services should follow the same principles that define special programs in employment.

In broad terms, the structural mechanisms recommended for special programs in employment should be replicated in special programs designed to facilitate housing and services:

- For example, a program designed by a service provider should similarly collect and analyze information about the population that utilizes the service in question, to identify if any groups are being disproportionately excluded from the service.
- Likewise, housing and services programs should assess and collect evidence of disadvantage; identify target groups; set up short-term and long-term goals; conduct scheduled reviews and assessments of the programs, and so on.

4.1.1 Examples of Special Programs in Housing and Services

The following are some examples of special programs that may be set up for the benefit of protected groups in housing and services:

- A transit company runs a special program that offers discounted fares to seniors and persons with disabilities.
- A co-op housing society establishes a special program to allocate a fixed number of houses on a preferential basis to members of the LGBTQ2S community.
- A college or university sets up a special program that reserves five percent seats in an academic unit for students of Aboriginal ancestry.
- A sports federation operates a special program that grants preference to women athletes in provincial leagues and competitions.

  Example: *The Ontario Women's Hockey Association operated a special program, which excluded men from participating in its women-only league. The Board accepted the legitimate purpose of the program, in consonance with Section 13 (now Section 14) special programs provision of the Ontario Human Rights Code. The Board reviewed the evidence on men's and women's hockey programs in Ontario and accepted that the Women's Hockey Association needed to exclude men from its program to survive. However, the Board rejected the argument that, as a result of its findings, women should be prevented from playing on men's teams; there was no evidence that men's hockey needed to be protected from an influx of female players.*[85]

- An urban housing complex sets aside two housing units for preferential allocation to single mothers or pregnant women.

- A vocational institute grants a certain number of priority admissions to students belonging to low-income families.
- A restaurant has a special program that provides concessional meals to persons on social assistance.
- A school district establishes 10 annual scholarships valued at $500.00 each for students identifying with mental or physical disability.
- Through a special program designed to remedy the exclusion of older adults, a hair saloon offers discounted service rates to senior citizens.
- A gym offers women-only exercise classes, based on surveys and feedback that women are less likely to participate in exercise classes with men.

For More Information

For more information about the *Act* or this guideline, please contact the Commission at 1-888-471-2233 toll-free within New Brunswick, or at 506-453-2301. TTD users can reach the Commission at 506-453-2911.

You can also visit the Commission's website at http://www.gnb.ca/hrc-cdp or email us at hrc.cdp@gnb.ca

New Brunswick Human Rights Commission
P.O. Box 6000
Fredericton, NB E3B 5H1
Fax 453-2653

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Endnotes

[1] Employers, housing, and service providers have a duty to accommodate groups protected under human rights law to the point of undue hardship. For example, a transit service is required to provide reserved seating for persons with disabilities; this measure falls under the duty to accommodate, because it allows disabled persons equal access to a service available to the public.

[2] The first special program provision in human rights statutes was adopted in the Nova Scotia *Human Rights Act* as "approved programs" (now Section 25): "The Commission may approve programs of Government, private organizations or persons designed to promote the welfare of any class of individuals, and any approved program is deemed not to be a violation of the prohibitions of this *Act*". New Brunswick adopted its special program provision in 1971 (now in Section 14 of the *Act*). Ontario's special program clause was introduced in 1972. The Manitoba *Human Rights Act* uses the term "affirmative action programs" and included it in 1974, the same year as Northwestern Territories (special programs). Prince Edward Island's *Human Rights Act* added its special programs section in 1975, followed by the Canadian *Human Rights Act* in 1977. Saskatchewan included a special program provision in its *Human Rights Act* in 1979; it was repealed in 1985, but incorporated again in 2018 (Section 55). Newfoundland and Labrador brought in a special programs amendment in 1983. Section 13 of the Yukon *Human Rights Act* (added 2002) employs the term affirmative action programs, while Part III of the Quebec *Charter* (1985) also uses the title affirmative action programs.

[3] Fay Faraday, Margaret Denike, and M. Kate Stephenson. "In Pursuit of Substantive Equality". *Making Equality Rights Real: Securing Substantive Equality Under the Charter*. Ed. M. Kate Stephenson. Toronto: Irwin Law Inc., 2006. 9-28 [*Faraday*].

[4] Under international law, covenants, statutes, protocols, and conventions are legally binding on states that ratify them; declarations, principles, guidelines, and recommendations do not have binding legal effect, but they have moral authority to guide states in their conduct. The formal, legal articulation of contemporary international human rights originates in the *International Bill of Rights*, which includes the *Universal Declaration of Human Rights* (1948), the *International Covenant on Economic, Social, and Cultural Rights* (1966), and the *International Covenant on Civil and Political Rights* (1966).

[5] For special program provisions in other international covenants, see Part III, Articles 10(3) and 11(2) of the *International Covenant on Economic, Social, and Cultural Rights*, and Part II, Article 2 of the *International Covenant on Civil and Political Rights*.

[6] L'Heureux-Dubé, Claire. Preface. *Making Equality Rights Real: Securing Substantive Equality Under the Charter*. Ed. M. Kate Stephenson. Toronto: Irwin Law Inc., 2006. 3-7.

[7] The full text of Section 15(2) of the *Charter* reads as follows: "Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability".

[8] Rosalie Silberman Abella. *Equality in Employment: A Royal Commission Report*. Supply and Services Canada: Ottawa, 1984 [*Abella Report*]. An electronic version of the complete report can

be accessed here: https://www.bakerlaw.ca/wp-content/uploads/Rosie-Abella-1984-Equality-in-Employment.pdf

[9] Justice Abella endorses this view: "Section 15(2) covers the canvas with a broad brush, permitting a group remedy for discrimination. The section encourages a comprehensive or systemic rather than a particularized approach to the elimination of discriminatory barriers" (*ibid.*).

[10] The aggregated term "visible minority", which lumps together disparate nonwhite groups, is a problematic category. Justice Abella, who adopted the term in the *Abella Report*, has since questioned its efficacy: "To combine all non-whites together as visible minorities for the purpose of devising systems to improve their equitable participation, without making distinctions to assist those groups in particular need, may deflect attention from where the problems are greatest". In 2012, the United Nations noted that the term could homogenize experiences of different ethnic groups: "Its lack of precision may pose a barrier to effectively addressing the socioeconomic gaps of different ethnic groups." Tavia Grant and Denise Balkissoon. "Visible Minority: Is It Time for Canada to Scrap the Term?" *Globe and Mail*, Feb. 7, 2019.

[11] Section 2 of the *Employment Equity Act* reads: "The purpose of this Act is to achieve equality in the workplace so that no person shall be denied employment opportunities or benefits for reasons unrelated to ability and, in the fulfilment of that goal, to correct the conditions of disadvantage in employment experienced by women, Aboriginal peoples, persons with disabilities and members of visible minorities by giving effect to the principle that employment equity means more than treating persons in the same way but also requires special measures and the accommodation of differences".

[12] The Government of Ontario enacted an employment equity legislation in 1993, but it was repealed in 1995 and replaced by the *Job Quotas Act*, which introduces a mandatory employment equity scheme for women, Aboriginal peoples, disabled persons, and visible minorities in the provincial public service, and in a large segment of the private employment sector.

[13] The full text of the section reads as follows: "14(1) On the application of any person, or on its own initiative, the Commission may approve a program to be undertaken by any person designed to promote the welfare of any class of persons. 14(2) At any time before or after approving a program, the Commission may do any of the following as the Commission thinks fit: *(a)* make inquiries concerning the program; (*b*) vary the program; (*c*) impose conditions on the program; or (*d*) withdraw approval of the program. 14(3) Anything done in accordance with a program approved under this section is not a violation of the provisions of this *Act*".

[14] The *Act* uses the term "programs" instead of "special programs"; this document, however, deploys the term "special programs", to stay consistent with the nomenclature generally assigned to these programs in Canadian legal parlance.

[15] The contribution amount was raised from a previous maximum of $15,000, effective April 1, 2017.

[16] *Women Cannot Afford to Wait Any Longer: Pay Equity in the Private Sector in New Brunswick*. New Brunswick Coalition for Pay Equity, September 2017. http://equite-equity.com/userfiles/file/NB16023-01%20-%20Needs%20Assessment(1).pdf

[17] The Supreme Court commented: "Treating historically vulnerable, disadvantaged or marginalized groups in the same manner as groups which do not generally suffer from such

vulnerability may not accommodate, or even contemplate, those differences. In fact, ignoring such differences may compound them, by making access to s. 15 relief most difficult for those groups that are the most disadvantaged of all in Canadian society". *Egan v Canada*, 1995] 2 SCR 513 (CanLII) [*Egan*].

[18] *Centrale des syndicats du Québec v Quebec (Attorney General)*, [2018] 1 SCR 522 (CanLII) [*Centrale*]. The Supreme Court noted that if a group that has been included in the benefits of a program makes a complaint about its discriminatory impact, it would constitute a claim of discrimination, not reverse discrimination.

[19] The term reverse discrimination originated in American jurisprudence in the 1970s, following complaints against affirmative actions programs that sought to alleviate the under-representation of African-Americans in government employment. With the emergence of the alt-right and neoconservative movements in the United States, debates on reverse discrimination in the American legal system have gathered renewed momentum in recent years.

[20] *Centrale*, *supra* note 18.

[21] *R. v Kapp*, 2008 SCC 41 (CanLII) (para 28) [*Kapp*].

[22] *Watson v Nova Scotia (Human Rights Commission) (1995)*, 30 CHRR D/514 (CanLII). In a similar case, *Young v Lynwood Charlton Centre*, (2012) HRTO 1133 (CanLII), the Tribunal rejected a reverse discrimination claim against a special program; according to the Tribunal, the purpose and underlying rationale of the program was to relieve disadvantage, which made it a legitimate special program under Section 14(1) of the Ontario *Human Rights Code*.

[23] *Ontario (Human Rights Commission) v Ontario*, 1994 CanLII 1590 (ON CA).

[24] A Royal Commission report, authored by now Supreme Court of Canada Justice Rosalie Abella, emphasized the limitation of traditional laws and policies in bringing equality to designated groups. For example, summarizing her discussion with representatives of minority groups, Justice Abella noted: "They were largely persuaded that traditional anti-discrimination statutes and approaches were inadequate to deal with the magnitude of the problem, as were the myriad of measures and programs established to coax improvement out of a reluctant society. What was needed, these groups felt, was a comprehensive approach that would end an era of tinkering with systemic discrimination and introduce one that confronts it" (*Abella Report*, *supra* note 8).

[25] The concept of equality has been debated in ancient philosophy, the teachings of major world religions, the intellectual tradition of the Enlightenment, and contemporary philosophical and legal thought. Tarnopolsky and Pentney. *Discrimination and the Law*. Toronto: Thomson and Carswell, 2004.

[26] The notion of formal equality in Western jurisprudence is traced back to Aristotle's conceptualizations of equality in *Nicomachean Ethics* and *Politics*.

[27] The limitation of the similarly situated approach or formal equality was exposed in the Supreme Court of Canada's now overruled Bliss decision: a pregnant woman's employment insurance claim was assessed by comparing her situation with all other employees, overlooking her difference and specific circumstances. *Bliss v Canada (Attorney General) (1978)*, [1979] 1 SCR 183 [*Bliss*].

[28] The concept of substantive equality emerged in Western politics and jurisprudence in the Twentieth-Century; it offers a corrective to the constraining doctrine of formal equality.

[29] *Andrews v Law Society of British Columbia*, [1989] 1 SCR 143 CanLII [*Andrews*]. The case involved a UK citizen, who had completed all qualifications required to practice as a lawyer, but his application for membership to the law society of British Columbia was denied; according to the law society's regulations, only Canadian citizens could practice law in the province. The Supreme Court held that the rule violated Section 15(1) of the *Charter*, and could not be justified under the *Charter*'s Section 1 reasonable limits provision.

[30] In another important equality case, the Supreme Court outlined four contextual factors for determining inequality and discrimination: (1) pre-existing disadvantage, stereotyping, and prejudice; (2) the correspondence between the grounds and the actual need, capacity, or circumstances of the claimant; (3) the ameliorative purpose or effects of the law upon a more disadvantaged person or group; and (4) the nature and scope of the interest affected. *Law v Canada (Minister of Employment and Immigration),* [1999] 1 SCR 497 (CanLII) [*Law*] (para 88). As argued by Colleen Shepherd, the contextual approach to discrimination should examine inequality and inclusion at three levels: the micro or individual level; the institutional level; and the macro or historical level. The micro-context explores the social disadvantage faced by individuals from disempowered groups; it brings an up-close, hands-on appreciation of inequality, and shows how personal stories are wedged in larger histories and patterns of inequality and disadvantage. Secondly, inequality should be seen in its institutional context, both in the formal, legal structures of institutions, and in the informal day-to-day practices of institutions (workplaces, corporations, educational institutions, families, religious organizations, and communities). At the third macro-level, discrimination operates in the larger social, economic, political, and familial context, and reveals broader patterns of exclusion that undermine equality rights and impede institutional transformation. These three contexts (personal, institutional, and historical) are intricately interwoven; they intersect to produce and reproduce structures of inequality. Colleen Sheppard. Introduction. *Inclusive Equality: The Relational Dimensions of Systemic Discrimination in Canada*. Montreal: McGill-Queen's UP, 2010. 3-10 [*Sheppard*].

[31] The effects-based analysis of laws and policies, attentive to histories of disadvantage, has brought a series of Supreme Court decisions on equality as a substantive principle. Overarchingly, these decisions have focused on the historical neglect of designated groups, and emphasized concern and respect for human dignity.

[32] *Law*, *supra* note 30: The case involved a widow's claim that her *Charter* equality rights were violated when she was denied survivor's benefits under the Canada Pension Plan, because she was under the age of 35 at the time of her husband's death, she was not disabled, and she did not have any dependent children. According to the pension plan, she could not receive the benefits until she reached the age of 65. The Supreme Court noted that the purpose of Section 15(1) is "to prevent the violation of human dignity and freedom [caused by] disadvantage, stereotyping, or political or social prejudice"; it is "to promote a society in which all persons enjoy equal recognition at law as human beings or as members of Canadian society, equally capable and equally deserving of concern, respect and consideration". The Supreme Court's attention to dignity in situations of discrimination has been criticized as placing an additional burden of proof on applicants, who not only have to establish differential treatment based on an enumerated or analogous ground, but also to prove that the treatment violated human dignity. The focus on dignity may erode the material realities of power and inequality, and shift the emphasis from the structural and institutional contexts of inequality to abstract or subjective emotions and

grievances. Contributing to this debate, Denise Reaume comments: "Giving the concept [of human dignity] some meaningful content stands as perhaps the most significant challenge facing the Court in the coming years [….] It is out of the close reflection on the political, historical, and social contexts within which distinctions between groups arise that we will develop an increasingly rich concept of dignity" (Qtd. in Faraday, *supra* note 3). It should be kept in mind that in *Kapp* (*supra* note 21), its most important equality decision since *Law* (*supra* note 30), the Supreme Court moved away from a focus on human dignity, and returned the discrimination lens to the Andrews Test (*supra* note 29): To prove discrimination, an applicant must show that they were treated differently because of an enumerated or analogous ground, and the treatment was based on stereotype and prejudice.

[33] In *Law* (*supra* note 30), the Supreme Court called section 15 "perhaps the *Charter*'s most conceptually difficult provision." While the "quest for equality expresses some of humanity's highest ideals and aspirations," the challenge is "to transform these ideals and aspirations into practice in a manner which is meaningful for Canadians."

[34] As Sheila McIntyre observes, "When equality claims are really substantive, they should challenge privileged understandings of the world and privileged players' understandings of themselves [….] More than any other constitutional right, the right to equality is a redistributive right. It calls into scrutiny the quality of the relationships we forge with others in society. It questions the justice of the distribution of rights, privileges, burdens, power, and material resources in society and the basis for that distribution" (Qtd. in Faraday, *supra* note 3).

[35] It has been argued that the influence of neoconservatism in North American politics is resulting in a retreat of law and state policy to the strictures of formal equality, and government intervention to bring substantive equality is beginning to diminish. One compromise between a social welfare state and the privatized, free market non-interventionist state of neoconservatism has been described by Anthony Giddens as the "third way": a hybrid between the social welfare and the neoconservative model of state and society (Qtd. in Sheppard, *supra* note 30).

[36] Instead of "equal treatment", substantive equality emphasizes "treatment as an equal"; this is a maxim to espouse in legal and policy measures, and in the conception and design of special programs.

[37] As the Supreme Court of Canada observed: "The rights enshrined in s. 15(1) of the *Charter* are fundamental to Canada. They reflect the fondest dreams, the highest hopes and finest aspirations of Canadian society [….] It is easy to praise these concepts as providing the foundation for a just society which permits every individual to live in dignity and in harmony with all. The difficulty lies in giving real effect to equality. Difficult as the goal of equality may be it is worth the arduous struggle to attain. It is only when equality is a reality that fraternity and harmony will be achieved. It is then that individuals will truly live in dignity". *Vriend v Alberta*, [1998] 1 SCR 493 (CanLII).

[38] The text of Section 15(1) of the *Charter* reads as follows: "Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability".

[39] This is a fundamental equality clause that ensures equal treatment in legal proceedings or legal process; it was part of the pre-*Charter* Canadian *Bill of Rights*, and was invoked in equality cases before the *Charter*. For example, it was enforced in the following decision: According to a then provision in the *Indian Act*, Aboriginal persons could be charged with a criminal offence if they

were found intoxicated outside the boundaries of their reserve. The Supreme Court of Canada declared that the provision contravened the "equality before the law" clause of the now repealed *Bill of Rights*. The provision impinged on racial equality, because it imposed more onerous constraints on Aboriginals than other Canadians; the latter could only be penalized for drunkenness in a public place. *R. v Drybones*, [1970] SCR 282.

[40] The equal protection of the law clause of Section 15(1) borrows from equality provisions of international human rights covenants, to which the Canadian state is signatory; for example, Article 7 of the *Universal Declaration of Human Rights* reads: "All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination". Further, Article 26 of the *International Covenant on Civil and Political Rights* states: "All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status". The equal protection clause of Section 15(1) also echoes the Fourteenth Amendment to the US Constitution, which granted citizenship rights and equal protection of the law to African-Americans following the American Civil War and the abolishment of slavery. The US Supreme Court, in interpreting the scope of the Fourteenth Amendment, brought all other non-white races in United States under its "equal protection of the law" injunction. For example, in *Yick Wo v Hopkins* (1886), citing the Fourteenth Amendment, the US Supreme Court invalidated discrimination against Chinese laundrymen. However, despite this and similar decisions and the *Civil Rights Act* of 1875, the US Supreme Court endorsed racial segregation in *Plessy v Ferguson* (1896), which was not ruled unconstitutional until the 1954 decision of *Brown v Board of Education*.

[41] The "equal benefit of the law" clause is meant to ensure that different benefits and burdens are not permitted for different classes of citizens. For example, in a pre-*Charter* decision, the Supreme Court of Canada validated the reduced leave benefits of a pregnant employee, while the benefits of other employees were not impacted. In a subsequent decision, in the wake of the Section 15(1) *Charter* provision, the Supreme Court declared that the "equal benefit of the law" clause of the section disallows unequal distribution of benefits. See *Brooks v Canada Safeway Ltd.,* [1989] 1 SCR 1219, which overruled the Supreme Court's earlier verdict in *Bliss* (*supra* note 27).

[42] *Abella Report*, *supra* note 8 (8).

[43] The list of grounds is preceded by the phrase "in particular", which implies that the list is not exhaustive. The Supreme Court of Canada endorsed that "analogous grounds", in addition to those "enumerated" in the section, can be added by courts and can form the basis of equality claims. The context of an affected group, its historical disadvantage and relative powerlessness in society, is the key factor to determine if the group merits protections through special measures. (*Andrews*, *supra* note 29).

[44] In *Miron v Trudel*, [1995] 2 SCR 418, the Supreme Court recognized "marital status" as an analogous ground under Section 15(1) of the *Charter*: The complainant challenged a provision of the *Ontario Insurance Act*, which allowed married spouses involved in accidents benefits for loss of income or damages, but did not extend the same benefits to common law spouses. It was held that the complainant suffered discriminatory treatment based on marital status, because the law only provided benefits to married couples and thus discriminated against common-law couples. See also, *Egan*, *supra* note 17: The *Old Age Security Act* defined spouse as a person of the

opposite sex, with whom a pensioner was married or lived in a common law relationship. The complainant, a gay man in a same-sex relationship, was denied the spousal benefit because he did not meet the *Act*'s definition of a spouse. Although the court dismissed the application in a split decision, it recognized sexual orientation as an analogous ground of discrimination under Section 15(1) of the *Charter*.

[45] For example, Section 23 of the *Charter* protects language rights and freedoms, while Section 25 guarantees aboriginal rights and freedoms. Section 27 safeguards the diversity of cultural heritage, and Section 28 mandates gender equality. Furthermore, Section 36 declares the state's commitment to promote equal opportunity and reduce economic disparity. Read within this cluster of rights, the equality provision of the *Charter* confers on a diverse citizenry the right to integrate into mainstream Canadian society, embracing the notion of difference and inclusion.

[46] *Lovelace v Ontario*, [2000] 1 SCR 950 (CanLII) [*Lovelace*]: The Supreme Court considered the relationship between Sections 15(1) and 15(2) of the *Charter* – it described the latter as an "interpretative aid" that is "confirmatory and supplementary" to 15(1); reading both sections together "ensures the internal coherence of the *Charter* as a working statute" (paras 105-106).

[47] *Kapp*, *supra* note 21 (para 59). In the only pre-*Charter* "affirmative action" case, the Supreme Court of Canada accepted a program for Aboriginal people "so that they may be in a competitive position to obtain employment without regard to the handicaps [they have] inherited". The Supreme Court required no external evidence; it took judicial notice of the disadvantage and upheld the validity of the special program. *Athabasca Tribal Council v Amoco Canada Petroleum Co. Ltd. (1981)*, 124 DLR. (3rd) 1 (SCC).

[48] *Keyes v Pandora Publishing Assn. (1992),* 16 CHRR D/148 (NS Bd. Inq.).

[49] *Abella Report*, *supra* note 8: Exploring the representation of women, Aboriginal groups, disabled persons, and visible minorities in 11 designated crown corporations, the *Abella Report* identified gaps in employment equity for these groups, and made recommendations for remedying inequality in federal employment.

[50] Carol Agocs. Introduction. *Employment Equity in Canada: The Legacy of the Abella Report*. Ed. Carol Agocs. Toronto: Oxford UP, 2014. 3-12.

[51] *Abella Report*, *supra* note 8: "The Commission notes this in order to propose that a new term, "employment equity", be adopted to describe programs of positive remedy for discrimination in the Canadian workplace" (6).

[52] *Ibid.* "Ignoring difference leads to inequality, while respect for difference ensures equal treatment" (7).

[53] *Ibid*. "Equality in employment is not a concept that produces the same results for everyone. It is a concept that seeks to identify and remove, barrier by barrier, discriminatory disadvantages. Equality in employment is access to the fullest opportunity to exercise individual potential" (3).

[54] *Ibid.* "To create equality of opportunity, we have to do different things for different people. We have to systematically eradicate the impediments to these options according to the actual needs of the different groups, not according to what we think their needs should be" (4).

[55] *Ibid.* "This is a paradox at the core of any quest for employment equity: because differences exist and must be respected, equality in the workplace does not, and cannot be allowed to, mean the same treatment for all" (12-13).

[56] *Ibid.* "Equality demands enforcement. It is not enough to be able to claim equal rights unless those rights are somehow enforceable. Unenforceable rights are no more satisfactory than unavailable ones" (10).

[57] *Ibid.* "Equality in employment means [….] equal access free from arbitrary obstructions" (2).

[58] *Ibid.* "What we tolerated as a society 100, 50, or even 10 years ago is no longer necessarily tolerable. Equality is thus a process - a process of constant and flexible examination, of vigilant introspection, and of aggressive open-mindedness" (1).

[59] *Ibid.* "We have to give individuals an opportunity to use their abilities according to their potential and not according to what we think their potential should be. The process is an exercise in redistributive justice. Its object is to prevent the denial of access to society's benefits because of distinctions that are invalid" (4).

[60] *Ibid.* "Human rights acts, labor codes, and the *Charter of Rights and Freedoms* contain provisions to address the problem. By and large these provisions have been limited in two respects: they are restricted to individual allegations of discrimination; and they are potentially restricted, except under the Ontario *Human Rights Code* and the *Canadian Human Rights Act* to cases of intentional discrimination" (7-8).

[61] The *Act* recognizes 16 grounds of discrimination, in addition to sexual harassment and reprisal.

[62] *Ibid*. The *Abella Report* (*supra* note 8) defined discrimination as follows: "Discrimination means that an arbitrary barrier stands between a person's ability and his or her opportunity to demonstrate it. If the access is genuinely available in a way that permits everyone who so wishes the opportunity to fully develop his or her potential, we have achieved a kind of equality. It is equality defined as equal freedom from discrimination" (2).

[63] The Supreme Court of Canada has noted: "Discrimination can arise both from the adverse effects of rules of general application as well as from express distinctions flowing from the distribution of benefits [….] Section 15(1) makes no distinction between laws that impose unequal burdens and those that deny equal benefits". *Eldridge v British Columbia (Attorney General)*, [1997] 3 SCR 624, 151 DLR (4th) 577 [*Eldridge*].

[64] The Supreme Court of Canada described the distinction between direct and adverse effects discrimination as "artificial" and "malleable", and proposed a generic three-part test (Meiorin Test) to establish discrimination. *British Columbia (Public Service Employee Relations Commission) v BCGSEU,* 1999 SCC 652, [1999] 3 SCR 3. The three types of discrimination (direct, adverse effects, and systemic), however, continue to be referenced in legal scholarship and court decisions.

[65] Adverse effects discrimination branches into two types: 1. When all members of a group or sub-group are adversely impacted by a neutral rule or policy (categorical exclusions); and 2. When only some members of a group are adversely affected (disproportionate impact). Dianne Pothier. "Tackling Disability Discrimination at Work: Toward a Systemic Approach". *McGill JL & Health 17* 4.1 (2010).

[66] *Ontario Human Rights Commission & O'Malley v Simpsons Sears Ltd*, [1985] 2 SCR 536, 7 CHRR D/3102: Until this decision, only direct discrimination had been deemed unlawful by the courts. In another related case, which involved an employee's religious obligation clashing with a similar neutral employment rule, the Supreme Court observed that adverse effects discrimination can also reveal patterns of systemic discrimination, or institutionalized practices of social exclusion and discriminatory burdens. *Central Alberta Dairy Pool v Alberta (Human Rights Commission)* (1990), 12 CHRR D/417 (SCC). See also: *Bhinder v Canadian National Railway Co.,* [1985] 2 SCR 561.

[67] *Eldridge*, *supra* note 62.

[68] The overlap between systemic and direct discrimination were described in a landmark equality rights case that involved women seeking blue-collar jobs in the Canadian National Railway. The Supreme Court noted that "systemic discrimination in an employment context is discrimination that results from the simple operation of established procedures of recruitment, hiring and promotion, none of which is necessarily designed to promote discrimination." The Supreme Court went on to emphasize that "discrimination is then reinforced by the very exclusion of the disadvantaged group because the exclusion fosters the belief, both within and outside the group, that the exclusion is the result of 'natural' forces, for example that women 'just can't do the job'." *Canadian National Railway v Canada (Human Rights Commission),* [Action Travail des Femmes] [1987] 1 SCR 1114 at 1139 [*Railway*].

[69] *Abella Report*, *supra* note 8 (9).

[70] *Ontario (Human Rights Commission v O.T.F. (No.2)*, 1995 CanLII 7432 (ON SC).

[71] *Railway*, *supra* note 68.

[72] *Carter v Elementary Teachers Federation of Ontario* (2011) HRTO 1604 (CanLII).

[73] *Apsit v Manitoba Human Rights Commission (1987)*, 9 CHRR D/4457 (Man. QB). The decision was later overturned by the Manitoba Court of Appeal on technical grounds (the proceedings were not constituted properly); the Appeal Court stated that the lower court's decision was no longer a "strongly persuasive authority" since it had been overturned.

[74] *Larromana v Director of ODSP*, 2010 ONSC 1243 (CanLII). See also: *Alberta (Aboriginal Affairs and Northern Development) v Cunningham*, [2011] 2 SCR 670 (CanLII).

[75] *Lovelace, supra* note 46*.* Another example may illustrate this point: A community centre serving LGBTQ2S groups sets up a program to support bisexual groups within the trans community it serves. The program is based on a survey which shows that bisexual persons face stereotyping within both the heterosexual and LGBTQ2S communities.

[76] *Card v Ontario (Training, Colleges and Universities)*, 2017 HRTO 35 (CanLII).

[77] The federal Public Service Commission uses self-declaration for collecting information voluntarily provided by applicants in its appointment process; the confidentiality of the information is protected under the *Privacy Act*. Self-declaration information is used for statistical purposes (reports, analyses and special studies), and to compile workforce representation figures for

reports to Parliament. The New Brunswick EEO Program (see section 1.4) follows a similar self-declaration procedure.

[78] *Broadley v Steel Co. of Canada Inc. (1991)*, 15 CHRR D/408 (Ont. Bd. Inq.). The following example also endorses legitimate exclusions from a special program: A community rape crisis centre may provide support services to women and transgender women and not to men, based on statistics that women are more likely to be the victims of sexual assault.

[79] *Abbey v Ontario (Community and Social Services) (No. 2),* 2016 HRTO 787, 84 CHRR D/137.

[80] *Ball v Ontario (Community and Social Services),* 2010 HRTO 360 (CanLII): The case is important for recognizing extreme obesity as a form of disability protected under human rights.

[81] *Ontario (Human Rights Commission) v Ontario (Ministry of Health) (1994)*, 21 CHRR D/259 (Ont. CA).

[82] *XY v Ontario (Government and Consumer Services)* (2012) HRTO 726 (CanLII). The Tribunal observed that by narrowing transgender identify to the biological imperative of transsexual surgery, the policy overlooked the lived experience of transgender persons.

[83] *Railway*, *supra* note 68: In this early case that sheds light on the role of human rights commissions in designing special programs, the Supreme Court of Canada affirmed the jurisdiction of the Canadian Human Rights Tribunal to order the national railway company to adopt an affirmative action hiring program under Section 41(2)(a) of the federal *Human Rights Act*.

[84] *Odell v Toronto Transit Commission (No. 1) (2001)*, 39 CHRR D/200 (Ont. Bd. Inq.).

[85] *Blainey v Ontario Hockey Association (No. 1) (1987)*, 9 CHRR D/4549 (Ont. Bd. Inq.).